No. 14,190

IN THE

United States Court of Appeals

For the Ninth Circuit

SUPERIOR SAND AND GRAVEL MINING CO., INC., a corporation,

Appellant,

vs.

TERRITORY OF ALASKA,

Appellee,

and

VERNON C. SCHUBERT, DOROTHY SCHUBERT, CLARENCE D. SMITH, JR., LILLIAN E. SMITH, EUGENE E. SAXTON, DOROTHY M. SAXTON, ELLSWORTH E. SAXTON and GRACE D. SAXTON, Co-Partners Doing Business as the Northern Construction Association, and ELLSWORTH E. SAXTON, as Agent for Said Association,

Appellants,

vs.

TERRITORY OF ALASKA,

Appellee.

Upon Appeal from the District Court for the Territory of Alaska, Third Division.

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO.

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BRIEF FOR APPELLEE.

OPINION BELOW.

The opinion of the district court is reported at 114 F. Supp. 436.

JURISDICTION.

The jurisdiction of the district court was invoked under the Act of January 22, 1880, 21 Stat. 61, as

amended, 43 Stat. 1144, 30 U.S.C. §§ 29 and 30; and the Act of June 6, 1900, 31 Stat. 322, as amended, 48 U.S.C. § 101. The jurisdiction of this court rests on § 1291 of the new Federal Judicial Code.

QUESTIONS PRESENTED.

1. Whether ordinary sand and gravel are "mineral" within the meaning of the mining laws of the United States.

2. Whether leased, reserved school lands in Alaska were subject to claim under the mining laws of the United States at the time of the locations in question.

I. COMMON SAND AND GRAVEL ARE NOT "MINERAL" WITHIN THE MEANING OF THE TERM AS USED IN THE MINING LAWS OF THE UNITED STATES, AND HENCE DEPOSITS OF THESE MATERIALS, AND THE PUBLIC LANDS IN WHICH THEY ARE FOUND, ARE NOT OPEN TO CLAIM AND PURCHASE UNDER THE MINING LAWS.

The right to explore and purchase mineral deposits and to occupy and purchase the lands of the United States in which they are found exists by virtue of the Act of May 10, 1872, 17 Stat. 91, 30 U.S.C. § 22 (1952). In pertinent part this act provides that "all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those

who have declared their intention to become such * * *".

For the purposes of the Territory of Alaska's motion to dismiss in this case, granted in the lower court, it was unchallenged that all of the alleged mineral claims involved were made, pursuant to the quoted statutory language, on valuable deposits of common sand and gravel found in lands belonging to the United States. The fact is also clear that no materials other than common sand and gravel useful for general building and construction purposes were discovered on the land (R. 68).

It is beyond controversy that the statute quoted *supra* requires that the deposits upon which mining claims are based, whether lode or placer, must be "mineral". Thus the question of law is presented whether valuable deposits of common sand and gravel are "mineral" within the scope of the term as used in Title 30, U.S.C. § 22 (1952).

This question is to be distinguished from the question of fact as to whether a substance universally recognized as mineral, as for example gold, occurs in sufficient quantity and quality on any certain land so as to render that land open to occupation and purchase under the mining laws rather than under the homestead or other laws relating to entry on the public lands.

The distinction of these two questions, the former one of law and the latter one of fact, puts in proper perspective the argument made by appellants that the question raised by this case is exclusively for the

Land Office of the U. S. Department of the Interior* and beyond the jurisdiction of the court in this proceeding. Both appellants have asserted that the determination of the mineral or non-mineral character of the land is solely for the Land Office. With this latter proposition, a matter of fact determination, appellee has no argument, but that is not the question raised by the motion to dismiss in this case; rather, the question is whether, as a matter of law, ordinary sand and gravel are considered "mineral" wherever found. Recognizing this distinction, the court below summarily and properly disposed of this objection by indicating the jurisdictional question was not presented by the record (R. 38).

A. The history of the mining laws of the United States, and their judicial and administrative interpretation to 1944, show that Congress did not intend to include sand and gravel within the scope of the term "mineral".

While the first Congressional declaration with reference to mineral lands may be found in the ordinance of May 20, 1785 (1 Lindley on Mines 163, 3d. ed.), it is sufficient to consider the history of the mining laws from the Act of May 10, 1872, *supra.* This act fixed the policy of the government as to the exploration, development, and purchase of mineral lands which, to all intents and purposes, constitutes the present system. The Congressional intent in using the term "mineral" should first be considered from the time of passage of this act.

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*Henceforth this office is referred to as the Land Department, the term indicating both the Department of the Interior and its subordinate agency, or either, as the case may be.

By the well-recognized general rule of statutory construction the word should be interpreted in its ordinary and commonly accepted sense, *U.S. v. Cooper Corp.* 312 U.S. 600, 605, 50 Am. Jur. 228, and as it was understood at the time when the statute was enacted. 50 Am. Jur. 224. This rule was a basis of the executive interpretation of the statute announced by the U. S. Land Commissioner a year after passage of the act. In a circular of instructions of July 15, 1873, the Commissioner enunciated the rule for interpreting the word "mineral" as follows:

> In the sense in which the term "mineral" was used by Congress, it seems difficult to find a definition that will embrace what mineralogists agree should be included * * * From a careful examination of the matter, the conclusion I reach as to what constitutes a valuable mineral deposit is this: *That whatever is recognized as a mineral by the standard authorities on the subject,* where the same is found in quantities and quality to render the land sought to be patented more valuable on this account than for the purpose of agriculture, should be treated by the office as coming within the purview of the mining act of May 10, 1872. (*Emphasis added*).

It should be noted that this definition established two basic criteria for ascertaining whether a substance came within the term "mineral", as used by Congress: first, the substance must be recognized as "mineral" by the standard authorities on the subject; second, the substance must be found in quantities and quality to render the land where found more valuable on account of the presence of the substance than for

agricultural purposes. The first of these tests points to the legal question primarily involved in this case, whether the term "mineral" was meant to include sand and gravel; the second test involves the question of fact already noted as not in dispute in this case, the value of the material found being admitted. It is the first test that is of present concern.

Available references as to what standard authorities at the time of passage of the act recognized as "mineral" indicate that not a single one so classified common sand and gravel of the kind here involved. *Zimmerman v. Brunson,* 39 L. D. 310, 312. At least until 1910 there were apparently no applications to purchase such a deposit under the mining laws. *Id.* Webster's Standard Dictionary defined "mineral" as "any inorganic species having a definite chemical composition". Sand and gravel were certainly not within the scope of this well-recognized definition, since these materials are a heterogeneous mixture of indeterminate and widely varying composition.

Sixteen years after passage of the act the U. S. Supreme Court apparently took for granted that sand and gravel were not then within the scope of the term "mineral". In *U. S. v. Iron Silver Mining Company* (1888), 128 U.S. 673, 679, the court was discussing the term "placer claim" as used in the mining laws and said, "By the term 'placer claim', as here used, is meant ground within defined boundaries which contains mineral in its earth, sand, or gravel * * * ". The implication is apparent that earth, sand, or gravel, were not in themselves considered mineral and

subject to placer claim but might be a vehicle containing minerals, as for example auriferous gravel.

No American cases adjudicated by the courts or rulings of the Land Department by the time of passage of the mining act of 1872, or within thirty-five years after then, appear to have held sand and gravel to be "mineral". From the available evidence as to what standard authorities classed as "mineral", it must be concluded that ordinary sand and gravel were not so considered at the time of passage of the act.

Soon after enactment of the mining law of 1872, question arose whether such a frequently occurring substance as building stone, by which was meant rock found in place such as granite, limestone, etc., constituted a mineral deposit. The Land Department held that land containing granite useful for building purposes was not subject to entry under the mining laws. *Conlin v. Kelly* (1891), 12 L. D. 1. And at least one court held similarly regarding limestone. *Wheeler v. Smith* (Wash., 1893), 32 P. 784.

Almost immediately following the Land Department's decision in *Conlin v. Kelly, supra,* the Congress acted to extend the mining laws in order to permit mineral entry upon lands containing such building stone. Act of August 4, 1892, 27 Stat. 348, 30 U.S.C. § 161. This purpose of the act is stated succinctly in *Dunbar Lime Co. v. Utah-Idaho Sugar Co.* (C.A. 8th Cir., 1926), 17 F. 2d 351, 355-356.

Granite, limestone, marble, and other building stones, while of a nature to meet the test for "min-

eral" of having a definite chemical composition, had not been classed as such by standard authorities, as illustrated by the cases cited, *supra.* The fact of the common occurrence of these stones appears to have been a reason for their not being treated as "mineral" by the Land Department or other authorities prior to passage of the Building Stone Act. *Conlin v. Kelly, supra.* Since Congress found is necessary to extend the mining laws especially to include these materials, and limited the extension to them, it may properly be reasoned that Congress did not intend to include such frequently occurring substances of indeterminate composition as ordinary sand and gravel within the term "mineral deposits". Had the intention been otherwise, it would have been a simple matter to make it clear by similarly express statutory provision, but this was not and has not been done.

In *Pacific Coast Marble Co. v. Northern Pacific R. R. Co.,* (1897), 25 L.D. 233, the question arose whether a deposit of marble should be considered "mineral" under the mining laws and other laws relating to disposal of public lands. The parties opposed to the mineral claimant sought to show that only metalliferous deposits were intended to be classed as "mineral" under the various laws.

In a detailed opinion the Secretary of the Interior rejected this contention and held that any substance recognized as mineral by the standard authorities on the subject, where found in quantity and quality to render the land more valuable on account of the deposit than for agriculture, would constitute "a valu-

able mineral deposit''. This decision made clear that nonmetallic minerals, such as marble, mica, borax, kaolin, limestone, gypsum, etc., commonly recognized as minerals by standard authorities, were meant to be included within the term ''mineral'' as used in these laws. While emphasis in this opinion was placed on the test of the value of a deposit as a means of determining whether given land was open to acquisition under the mining laws, the initial test of whether the substance found was recognized as ''mineral'' by the standard authorities on the subject was retained as fundamental. The non-metallic substances cited in the opinion as examples of deposits open to claim were all generally recognized as minerals and would all meet the test of having a definite chemical composition. There was no suggestion that deposits of nonmetallic substances not generally recognized as minerals, such as sand and gravel, would be available for purchase under the mining laws.

The question whether ordinary sand and gravel, suitable for mixing with cement for construction, should be considered ''mineral'' within the meaning of mining laws was first ruled on by the Land Department in *Zimmerman v. Brunson* (1910), 39 L.D. 310, and it was held that without specific legislation by Congress the Department would refuse to classify deposits of these materials as ''mineral''. After setting out the Department's test for the determination of minerals, cited *supra,* the opinion observed that no standard American authority classified sand and gravel deposits suitable for building purposes as

"mineral". As further reason for not classifying these materials, the opinion pointed out the considerable frequency with which such deposits occur in the public domain, which was held to indicate the general understanding that they were not to be regarded as mineral unless possessing a peculiar property or characteristic giving them a special value. The chief value under the facts of this case was proximity of the deposits to a town, and this was held an insufficient basis on which to classify them as "mineral". The opinion cited cases in which building stone of various types had been classified as nonmineral by the Department, prior to passage of the Building Stone Act, cited *supra;* the inference was that without similar specific legislation by Congress bringing sand and gravel within the mining laws, these latter substances should not be considered mineral. Further support for the conclusion reached by the case was drawn from analogy with deposits of ordinary brick clay, which had been held "non-mineral" in *Dunluce Placer Mine* (1888), 6 L.D. 761, and in *King v. Bradford* (1901), 31 L.D. 108.

Appellants have sought to characterize the decision in *Zimmerman v. Brunson, supra,* as an exception and departure from the rule of interpretation of the term "mineral" fixed by the Land Commissioner in 1873 and affirmed in *Pacific Coast Marble Co. v. Northern Pacific R. R. Co., supra.* (Brief of Schubert, et al., pp. 6-7). This characterization fails to consider the first element of the rule, that the substance must be one generally recognized by standard authorities as

mineral, and is thus a misinterpretation of the import of the latter decision as well as of the stated rule.

In *Holman v. State of Utah* (1912), 41 L.D. 314, the Land Department, in again considering deposits of ordinary clay, held that they should not be classed as "mineral" under the mining laws. The principal reason supporting the decision was stated by the Department to be as follows:

> "It is not the understanding of the Department that Congress has intended that lands shall be withdrawn or reserved from general disposition, or that title thereto may be acquired under the mining laws, merely because of the occurrence of clay or limestone in such land, even though some use may be made commercially of such materials. There are vast deposits of each of these materials underlying great portions of the arable land of this country. It might pay to use any particular portion of these deposits on account of a temporary local demand for lime or for brick. If, on account of such use or possibilities of use, lands containing them are to be classified as mineral, a very large portion of the public domain would, on this account, be excluded from homestead and other agricultural entry. It is safe to say that every kind of material found in land in its natural state may under some circumstances be put to non-agricultural uses. Local demand for building of levees or railroad embankments, filling up low places and the like, may make any particular land more valuable for the time on account of the material it contains than on account of its agricultural possibilities, but it is clear that such considerations can not be given weight in determining what lands are reserved

> for special disposition because mineral in character. In one sense, all land except portions of the top soil is mineral. The term, however, in the public-land laws is properly confined to land containing materials such as metals, metalliferous ores, phosphates, nitrates, oils, etc., of unusual or exceptional value as compared with the great mass of the earth's substance. It is not intended hereby to rule that there may not be deposits of clay and limestone of such exceptional nature as to warrant entry of the lands containing such deposits under the mining laws."

The reasoning of this statement applies as well to sand and gravel as to clay, and as a matter of fact the Land Department has never distinguished between these materials in considering the application of the mining laws to them.

What appears to have been the first judicial consideration of the application of the mining laws to a substance of the kind here involved was made almost immediately following the Land Department's decision in *Zimmerman v. Brunson, supra.* The Supreme Court of Oregon, in *Loney v. Scott* (1910), 112 P. 172, held that sand useful for building purposes should be considered as "mineral" under the mining laws. This opinion was based primarily on the ground that the land involved was more valuable for the building sand it contained than for agriculture.

As recognized in the opinion of the court below (R. 36) this proposition made value of the material a sole test of whether a substance should be classed as "mineral", disregarding the factor of chemical com-

position of the substance, which was a prime element of the definition of "mineral" as used by standard authorities. Such a test would render the content of the word "mineral", as used in the mining law, frequently variable according to place or time, the value of such material as sand and gravel being often principally dependent upon the proximity of the deposit to a town or city. This text was rejected by the Land Department in *Zimmerman v. Brunson, supra,* apparently for the reason that it did not furnish a sufficiently definite standard upon which to determine whether a substance should be classed as "mineral" under the mining laws.

The Oregon court cited no standard authority on the question as to whether sand or gravel should be classed as "mineral", and hence its consideration of the question failed to meet the authoritative, well-recognized test used by the Land Department in applying this Federal law. A reference was made to an annual report of the U. S. Geological Survey on the mineral resources of the United States in which building sand was shown to have been produced in large quantities in the year of the report. This of course indicated the financial value of this material produced, but as the report was one evidently not concerned with the application of the mining laws, it was not of significant value for determining a question of first impression of such importance to the administration of the public lands as was facing the court.

The only other authority used by the Oregon court in arriving at its conclusion was *Northern Pacific*

Railway Co. v. Soderberg, 188 U.S. 526 (1902). The question involved in that case was whether a deposit of granite used as building stone was "mineral" within the terms of an act of Congress of July 2, 1864, 13 Stat. 365, c. 217, granting certain lands to the railway company but excepting "mineral lands" from the grant. The defendant had subsequently established a mineral claim on the disputed land, apparently under the Building Stone Act, *supra,* and plaintiff sought to show the claim invalid on the ground that the land was not "mineral" and hence had passed to the railway company under the grant act of 1864.

It is plain that the *Soderberg* case, on its facts, cannot afford good precedent value for the conclusion reached in *Loney v. Scott.* The substance involved in the former case was granite found "in place" and clearly recognized as within the scope of the mining laws, at the time of both decisions, by virtue of the Building Stone Act of 1892. To extend the holding on these facts to the question of whether sand and gravel should be considered as "mineral" under the mining laws was entirely unwarranted since neither the substance involved nor the statute being interpreted were the same. And the list of other materials cited in the *Soderberg* case as having been considered "valuable mineral deposits", while it included building stone, such as granite, made no mention of sand useful for building purposes.

Because its finding, that building sand comes within the scope of the word "mineral", is based upon an uncertain guide for determining the meaning of

the term and upon precedent which does not warrant this conclusion, *Loney v. Scott* should be rejected as authority on the issue.

The most fully-considered pertinent court decision was rendered in *U. S. v. Aitken, et al.* (1913), 25 Phil. 7, where the court was considering the question raised herein under a Congressional statute of identical wording applying the mining laws to the Philippine Islands. Act of July 1, 1902, Section 20, 32 Stat. 691, 697. In this case the contention that sand and gravel should be considered "mineral" was rejected on several grounds.

Sand and gravel were shown to fail the scientific test of a "mineral" in not having a definite chemical composition. The court reviewed its search of standard authorities and indicated that none had reported sand and gravel as minerals, thus showing that these materials failed to meet the test fixed by the Land Department to determine whether a substance was "mineral" under the mining laws. The argument that Congress had not extended the mining laws to sand and gravel, while doing so in the case of building stone, petroleum, saline lands, and other substances, was fully stated. The court recognized that Congress must have been aware of the valuable uses to which sand and gravel were commonly being put, including commercial uses such as the making of concrete, and hence the failure to extend the mining laws to include these materials, otherwise generally considered non-mineral and already ruled to be so by the Land Department, was held to indicate the Congres-

sional intent not to make these materials subject to mineral claims. *Zimmerman v. Brunson* was cited with approval.

The court indicated that such materials as sand and gravel had never been considered, generally or by the Land Department, as building stone, only rock "in place" and quarried being treated as such, thus showing that sand and gravel were not within the scope of the Building Stone Act of 1892. The further reason for holding lands bearing deposits of sand and gravel not open to mineral entry was stated that since these are valuable road-building materials, and the government is primarily responsible for the construction of public roads, it would be obviously unwise and unreasonable for the government to divest itself of their ownership, only to have to repurchase them in order to discharge the road-building function.

On its reasons as cited, and its supporting authority, the fully-considered opinion of the *Aitken* case should be followed as the leading precedent on the question at issue.

The Land Department in *Layman v. Ellis,* 52 L.D. 714 (1929), reversed its holding in the *Zimmerman* case and held land valuable on account of sand and gravel deposits subject to entry under the mining laws. In support of this holding the Department cited the listing of sand and gravel as a "mineral resource" by the United States Geological Survey and indicated that the material was valuable for use in trade, manufacturing and the mechanical arts. The reasoning that

the mere fact of a substance found in the earth being valuable should constitute it a "mineral" under the mining laws has already been rejected. The opinion stated expressly that the test of having a definite chemical composition should not be considered the sole test of whether a substance is "mineral". From this it was apparently assumed that the test should not be used at all. While it may be true that the requirement of having a definite chemical composition should not be the sole test of whether a substance is "mineral" under the mining laws, yet on reason it would appear to be a proper and necessary consideration if the word "mineral", as used in the mining laws, is to have a predictable, definite content. The opinion should be held in error in rejecting this consideration as an element of the test of whether a substance is "mineral".

The opinion cites *Northern Pacific Railway v. Soderberg* and *Loney v. Scott* in support of its construction of the statute. As argued in the consideration of *Loney v. Scott,* these two cases should not be held to support a finding that sand and gravel are "mineral" under the mining laws of the United States.

The Land Department followed the rule of *Layman v. Ellis* in an opinion of the Acting Solicitor, 54 L.D. 294 (1933), and in *U. S. v. Barngrover,* 57 L.D., 533 (1942), the latter case applying the rule to desert clay and silt. For the reasons already stated, this line of decisions should be rejected as an interpretation of the mining law.

Appellants argue that Congress has inferentially agreed with the view expressed by *Layman v. Ellis,* or else corrective legislation would have been enacted following that decision (Brief of Schubert, et al., p. 15). This line of argument might be applied with more force to reach an opposite conclusion. For the thirty-eight years from the passage of the Act of May 10, 1872, *supra,* until the decision in *Zimmerman v. Brunson* in 1910 the Congress acquiesced in a policy which apparently did not recognize mineral claims on deposits of ordinary sand and gravel. And when this policy was made express by the latter decision, the Congress took no action to change it during all of the intervening years until the *Layman v. Ellis* case. This should be viewed in contrast with the quick action taken by Congress in the most closely analogous situation: passage of the Building Stone Act of 1892 within a year of the Land Department's denial of the mineral claimant's rights sought to be recognized in *Conlin v. Kelly, supra.*

B. By passage of the Materials Act in 1944 the Congress made further evident its intent that sand and gravel are not subject to mineral claim.

While it should appear sufficiently clear that common sand and gravel ought not to be considered as "mineral" under the mining laws prior to 1944, an expression of Congressional intent made that year provides further convincing evidence that these substances are not to be disposed under the mining laws. In the Act of September 27, 1944, P. L. 429, 78th Cong. 2d. Sess. the Congress provided specifically

for the disposition by sale of sand, gravel, and certain other materials from the public lands of the United States. This act was temporary, but its provisions were extended and made permanent by the Materials Act of July 31, 1947, 61 Stat. 681, 43 U.S.C. § 1185 *et seq.* By the terms of the latter act, the Secretary of the Interior was given authority to dispose of such materials as sand, stone, gravel, common clay and other substances on the public lands of the United States, if the disposal of such materials was not otherwise expressly authorized by law, including the United States Mining laws, and upon other conditions not relevant here.

It is axiomatic that laws relating to the disposal of public lands should be construed *in pari materia* and that, therefore, the mining laws should be considered as only a part of the statutory provisions relating to the disposition of public lands. Following this rule, it should be found that the Materials Act and the mining laws are complementary and that the substances authorized to be disposed under the Materials Act are not to be disposed under the mining laws. This proposition follows not only from the rule of construction stated but from the legislative history and the terms of the Materials Act, upon reason, and upon the authority of recent decisions of the Land Department.

As noted, the Materials Act states that the listed substances may be disposed under its terms only if not otherwise expressly authorized to be disposed by other laws, including the mining laws. It is clear

that common sand and gravel, as involved in this case, and clay, are not expressly authorized to be disposed under the mining laws. This limiting expression of the Materials Act may most reasonably be construed to apply to such substances as building stone, stone being one of the substances listed under the Act but building stone being expressly provided for under the mining laws, specifically 30 U.S.C. § 161. Appellants, in arguing otherwise (Brief of Schubert, et al., pp. 16-17), have disregarded the use and significance of this term, "expressly", as it appears in the Materials Act at 43 U.S.C. § 1185, (1). In emphasizing the phrase from the Materials Act, "including the United States mining laws", appellants apparently infer that sand and gravel are "mineral" under the mining laws, and thus they beg the question primarily at issue in this case.

The legislative history of the Materials Act likewise indicates that ordinary sand and gravel, as involved here, were not considered as coming within the scope of the mining laws, and that the Act was intended to provide for a manner of disposal of the listed materials which was exclusive of that provided under the mining laws, although complementary to and not inconsistent with the operation of those laws. This is shown by communications in support of the legislation addressed by the Department of the Interior to the Senate and House committees considering the measure; pertinent parts of these communications appear in the Brief of Schubert, et al., at Appendix pp. 15-16 and 27-28. The Department stated, *inter*

alia, that "There are on the public lands many materials and resources which can be used profitably for the benefit of local industries and communities and to the disposition of which there is no real objection. *There is, however, no permanent legislation under which these may be utilized.*" The communications then proceeded to list the materials of this class, and the list included "2. Sand, stone, and gravel not of such quality as to be subject to the mining laws * * *"

That the sand and gravel concerned in this case are of this common, ordinary character to be disposed under the Materials Act and not under the mining laws is shown by the fact that the Department of the Interior was already disposing of sand and gravel from the land involved under the provisions of the Materials Act when the mining claims at issue in this case were made (R. 4, 33, 53).

It may be noted parenthetically that appellee does not argue that sand and gravel of unique or special quality may not be classed as "mineral" and be subject to claim and purchase under the mining laws. Deposits of sand bearing a high percentage of silica, which is useful in the manufacture of glass or as an agent in the steel-making process, furnish an example of sand having a special quality making it subject to claim and purchase under the mining laws. Sand of this quality would of course meet the test of having a definite chemical content and would no doubt have been recognized as "mineral" by the standard authorities on the subject at the time of passage of the Mining Act of May 10, 1872.

That substances disposed under the Materials Act should not be held to come under the mining laws may be reasoned by analogy with the mineral leasing laws. Materials disposed under the mineral leasing laws are treated exclusively under the terms of these laws and may not be obtained under the mining laws. This proposition is stated expressly in the regulations of the Land Department relating to the mining laws, specifically 43 *C.F.R.* Sec. 185.2. This regulation is the successor to the rule of July 15, 1873, *supra,* relating to the definition of "mineral" under the mining laws. The regulation as now promulgated states in part as follows: "Deposits of coal, oil, gas, oil shale, sodium, phosphate, potash and in Louisiana and New Mexico sulphur, belonging to the United States, can be acquired under the mineral leasing laws and are not subject to location and purchase under the United States mining laws."

The Land Department in *Matter of Van Dolah,* Land Department case A-26443, decided October 14, 1952 (Appendix, p. vii), held in effect that a substance disposed under the Materials Act may not be disposed under the mining laws. This case concerned a disposition of common clay, and since it was one of the materials listed in the Materials Act, it was held that unless the clay had some peculiar, distinguishing characteristic for which it was especially valuable, it was properly disposed under the Materials Act and the land containing it would not be open to mineral entry. The opinion cites as further authority for this proposition Solicitor's Opinion M-36044,

July 7, 1950, and M-36056, November 10, 1950. While the *Van Dolah* case concerned clay, the Department, as has been noted, has never distinguished common clay from sand and gravel in considering whether these substances were subject to the mining laws. Hence, it is implicit in the *Van Dolah* decision that the *Layman v. Ellis* case and others following it should not be considered as properly interpreting the law regarding sand and gravel subsequent to the passage of the Materials Act.

C. Recent judicial decisions hold sand and gravel not "mineral" as the term is ordinarily used.

While, as has been stated, only two reported court decisions appear on the precise question of whether sand and gravel are "mineral" within the meaning of the mining laws, there are numerous recent decisions holding these substances to be "non-mineral" where the question has arisen in other contexts outside the mining laws. Most frequently the question has been whether, in deeds or other conveyances of land reserving minerals therein to the grantor, it was intended to include sand and gravel within the term "mineral". Cases holding directly on sand and gravel include *Psencik v. Wessels* (1947) 205 S. W. 2d 658; *Winsett v. Watson* (1947) 206 S. W. 2d 656; *Watkins v. Certain-Teed Products Corp.* (1950) 231 S. W. 2d 981; *Eldridge v. Edmondson* (1952) 252 S. W. 2d 605. Other pertinent cases include *Puget Mill Company v. Ducey* (Wash. 1939) 96 P. 2d 571; *Holloway Gravel Company v. McKowen* (La. 1942) 9 S. 2d 228, 230; *Beck v. Harvey* (Okla. 1944) 164

Pac. 2d 399; *Hans v. Great Bend Brick and Tile Company* (Kans. 1952) 241 Pac. 2d 475, 478; cf., *Heinatz v. Allen* (Texas 1949) 217 S. W. 2d 994, concerning limestone. The subject is annotated at 1 A.L.R. 2d 788.

II. THE LANDS EMBRACED WITHIN THE PLACER MINING CLAIMS IN THE COMPLAINTS WERE NOT AVAILABLE FOR MINING LOCATION UNDER THE TERMS OF THE ACT OF MARCH 4, 1915, 38 STAT. 1214, AS AMENDED BY THE ACT OF AUGUST 7, 1939, 53 STAT. 1243, 48 U. S. C. SEC. 353.

The lands under consideration herein were reserved by the Act of March 4, 1915, 38 Stat. 1214, for purposes of support of the common schools of Alaska. The amendatory Act of August 7, 1939, 53 Stat. 1243, made the land and the minerals therein subject to disposition under the mining and mineral leasing laws of the United States. The question raised is whether the particular lands involved in this case were open to such disposition at the time the mineral claims alleged by the complaints were established. At this time these lands were under leases granted by the Territory of Alaska to various parties for purposes of surface development and use (R. 52-55, 71-77).

A. Under the terms of the so-called School Reserve Law as amended, mineral entries could not be made in the absence of rules and regulations by the Secretary of the Interior relating to such entry and the fixing of conditions by the Secretary providing for compensation to lessees for damage to improvements on the leased lands.

1. The Secretary of the Interior had not issued rules and regulations for the purpose of carrying into effect the amendment permitting disposition of the land under the mining laws.

The amendatory Act of August 7, 1939, *supra* authorized the Secretary to make all necessary rules and regulations in harmony with the provisions and purposes of the Act for the purpose of carrying it into effect. Up to the time of the alleged mineral entries and to date the Secretary has not promulgated any such rules and regulations. It is obvious that opening pits to extract materials from the land, the surface of which is being used, may cause damage to the surface use. It would clearly result in chaos and controversy for unregulated mineral entry to be allowed upon leased "school section" lands. Hence it should be held as the reasonable interpretation of the amendatory act that no such entry could be made until the Secretary had implemented the act by making proper rules and regulations concerning such entry. Since no such rules and regulations have yet been made, it should be held that mineral entry was not authorized.

While it may be argued that the Secretary should have acted to promulgate the necessary regulations long before the time of the mineral entries made herein, it would appear that the proper remedy against any failure of duty in this regard would

have been an action to compel performance of the duty, or merely to have made a timely appeal to the Secretary to state what regulations, if any, might be applied. That there had been delay in establishing rules and regulations would furnish no warrant for indiscriminate entry and location of mineral claims, and especially in the face of prior dispositions and leases of the school section land by the Territory.

The need for regulations prior to the opening of the land for entry is shown by analogy to the unwritten but recognized policy of the Land Department of prohibiting location of minerals reserved from disposition upon so-called "Small Tract" lands until such time as the Secretary of the Interior promulgates regulations defining the terms and conditions for the making of such locations.

2. No conditions providing for compensation to any Territorial lessee for damages to crops or improvements on this land had been fixed at the time of the mineral entries alleged.

Under the terms of the amendatory Act of August 7, 1939, *supra,* the lands herein were to be subject to disposition under the mining laws upon conditions providing for compensation to any Territorial lessee for any resulting damages to crops and improvements on the lands. No such conditions had been fixed concerning the mineral entries herein alleged to be made. Congress could not have intended that such conditions were to be left to determination by the parties involved, as such policy could only result in unregulated controversy and would be unreasonable. It was incumbent upon prospective mineral locators at least

to ascertain from the Territory, in possession of and administrator of the reserved lands, what conditions for compensation to lessees applied before mineral entry could be made, and to obtain the consent of the Territory to the making of the locations. To hold otherwise would be to interpret the Act of August 7, 1939, unreasonably, since the result might well be, as in this very case, to defeat the purpose of the school reserve law itself, *i.e.,* to benefit the Territorial school fund. An example of the procedure of obtaining consent had in fact already been set and was a matter of public record at the time the mineral entries herein were made. This was in the case of the granting of the contract to the Anchorage Sand and Gravel Company, Inc., for the purchase of gravel from this land under the Materials Act; the Governor of Alaska granted permission to the Bureau of Land Management for the execution of the contract, and approval was also had from the City of Anchorage, lessee of the lands from which the gravel sold was to be extracted (R. 53). Since no conditions providing for compensation to lessees had in fact been made regarding these mineral entries upon leased, reserved land, and since the Territory did not consent to the making of the locations, it must be held that the entries were not authorized under the school reserve law as it then existed.

B. The subject lands were leased for purposes of making surface uses, and it would be unreasonable to permit incompatible uses and the destruction of the surface by extraction of gravel at the will of mineral locators.

This school reserve section was, at the time of the mineral entries alleged herein, entirely under lease, pursuant to the authority of Chapter 101, Session Laws of Alaska 1933, Sections 47-2-78 to 47-2-81, ACLA 1949, for purposes of making and developing surface uses (R. 52-55, 71-77). Exceptions to these were limited, defined areas from which gravel was being extracted under permit or contract for purchase of the material. It is obvious that the uncontrolled extraction of gravel would destroy the surface value of the land for business or residential purposes. On reason, therefore, it should be held that even though under the existing law mineral entries might be made on school lands, such entry should not be allowed where the particular mining activity is entirely incompatible with surface uses already being made. This proposition was enunciated in *U. S. v. Lindemuth* (1953) 110 F. S. 621, where the reasoning was stated in support of a holding that mineral entry for purposes of the extraction of gravel would not be allowed on lands being used for airport purposes. It is true that there had been a withdrawal of the land for airport purposes in that case, but the reasoning referred to applied as well in this case where mining activity of a type which results in complete destruction of the surface is entirely incompatible with uses and surface development plans sanctioned by the Territory as the public agency in control of these reserved lands. See also *U. S. v. Morley,* et al., No. A-7680

in the U. S. District Court of Alaska, Third Division, in an unreported opinion of December 17, 1952 (Appendix p. i). The proposition here made would not reflect against mining activity of a type compatible with the surface uses, as for example tunneling or the sinking of shafts to extract minerals from lode deposits.

C. To permit the mineral entries made herein would defeat the purpose of the school reserve law.

It is common knowledge and obvious on the face of the statute that the Act of May 4, 1915, was passed to provide additional financial support for the operation of the common schools of Alaska. The amendatory Act of October 7, 1939, was passed to permit mineral entry on the school reserve lands in the contemplation that mineral development of the lands would enhance the proceeds from their use and thus benefit the school fund. Subsequent to the making of the very mining locations involved herein, it became apparent that, in fact, the benefit from use of the lands thus located would accrue almost entirely to the locator and not to the Territorial School Fund as was intended. The Congress, therefore, acted to correct the situation by passing the Act of March 5, 1952, 66 Stat. 14, which repealed the earlier amendment making school reserve lands subject to location under the mining laws. House Report No. 559, 82nd Congress, First Session, (Brief of Schubert, et al., appendix pp. 2-10) makes clear the history and purpose of the Act of August 7, 1939, as well as the Act of March 5, 1952, and shows that it was never the intent of the Congress to permit mining activity of a

character which would operate to the detriment of the very purpose for which the basic law was written, *i.e.*, to benefit the Territory's School Fund.

With this knowledge of the intent of the Congress when it provided by the Act of August 7, 1939, for mineral entry on school reserve lands, no construction of that law should be made which would allow the defeat of that intent and purpose if a reasonable construction otherwise is possible. It is certain that to construe that law to permit the mineral claims alleged herein would result in defeat of the purpose of the school reserve law; this is made clear by the House Report cited, *supra*. It should therefore be held that in the absence of rules and regulations covering mineral entry on this land, in the absence of fixed conditions upon which prior lessees would be compensated for damage due to mining operations, and where the type of mining activity contemplated is of a character incompatible with surface uses already being made, then mineral entries such as those alleged herein were unauthorized and illegal under the law existing at the time said entries were made.

CONCLUSION.

A consideration of the history and purpose of the mining laws of the United States and of their judicial and administrative interpretation indicates that ordinary sand and gravel was not intended to be classed as "mineral" within the meaning of those laws.

The review of cases and authorities made herein furnishes sufficient basis for this proposition. And

the Congress has recently made its intent more clear by passage of the Materials Act, providing an original and exclusive means for disposition of sand and gravel from public lands.

From these considerations it must appear that there was no discovery of mineral in this case such as to support the location of placer claims under the mining laws of the United States.

But even if ordinary sand and gravel were to be considered as affording a basis for placer mining claims, the lands here involved were not open to mining claims for the surface extraction of these materials. The lands, reserved for the support of the schools of Alaska, were under lease for prior uses inconsistent with the extraction of gravel, and to permit mining of this character in these circumstances would defeat the purpose of the reservation.

For the reasons stated and upon the authorities cited, it is respectfully submitted that the judgment of the district court should be affirmed.

Dated, Juneau, Alaska,
August 16, 1954.

J. GERALD WILLIAMS,
Attorney General of Alaska,
THOMAS B. STEWART,
Assistant Attorney General of Alaska,
Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix

In the District Court for the District of Alaska
Third Division

No. A-7680

United States of America, ex rel., Lowell M. Puckett, Regional Administrator, Bureau of Land Management,
Plaintiff,

vs.

Gordon H. Morley and Wesley E. Edwards,
Defendants.

Opinion

Seaborn J. Buckalew, United States Attorney, Attorney for Plaintiff.

Defendants—pro se.

This suit arose out of the location by the defendants of placer mining claims for the purpose of removing the gravel therefrom on land immediately adjoining the incorporated City of Anchorage, Alaska, lying northerly of and adjoining what is known as the Fourth Addition to the City and about 1500 feet

north of Merrill Field Airport. The United States Government, upon relation of Lowell Puckett, Regional Administrator, Bureau of Land Management at Anchorage, Alaska, brought the suit to enjoin the defendants from removing the gravel from the claim so located.

The land involved had been "withdrawn from settlement, location, sale, entry or other disposition and reserved for townsite purposes" by lawful Executive Orders 1919½ dated April 21, 1914, which was amended and enlarged by Executive Order 3672, dated May 8, 1922. It appears incontestible that those orders effectively served to withdraw the land from location as placer mining claims.

Under the Act of Congress of August 30, 1949, 63 Stat. 679, Title 48, Sections 364a to 364e inclusive, U.S. Code, generally known as the Alaska Public Sales Act, and hereinafter referred to as the "Act", and the rules and regulations made thereunder, the lands were classified for sale and sold to various purchasers on April 19, 1952. The defendants' notice of location of placer claim is dated and was filed for record in the office of the United States Commissioner and Recorder at Anchorage, Alaska, on April 18, 1952.

The Act provides that patents may be issued to the purchasers of land at such sales under the conditions and subject to the restrictions provided in said Act and the rules and regulations made in accordance therewith. The Act contains a reservation to

the United States of all minerals in the lands so sold and patented together with the right to prospect for, mine and remove the same. Section 364c containing that reservation is here quoted:

> "Patents under said sections shall issue only after survey, and shall contain a reservation to the United States of all minerals in the lands patented, together with the right to prospect for, mine, and remove the minerals, and such other reservations as may be necessary and proper: Provided, That, notwithstanding the provisions of any Act of Congress to the contrary, any person who hereafter prospects for mines, or removes any minerals from any land disposed of under said sections shall be liable for any damage that may be caused to the value of the land and tangible improvements thereon by such prospecting for, mining, or removal of minerals. Nothing in this section shall be construed to impair any vested right in existence on August 30, 1949."

The Government asserts that the land was not open to location under the placer mining laws because it had been withdrawn from settlement, location, entry or other disposition and reserved for townsite purposes by the Executive Orders above mentioned, and that the Act segregates the land from mineral location until actual patent is issued to the surface owner as provided in the rules and regulations made pursuant to the Act, 43 C.F.R. 1951, Supp., embracing the following:

> "Sec. 75.29 Effect of application; segregation of land. (a) Subject to valid prior rights, the filing of an application in conformity with the

regulations in this part will segregate the land applied for from application, entry, or settlement under any public land laws or from mining locations except as provided in Sec. 75.39, pending classification of the land under the act. * * *"

"Sec. 75.35 Certificate of purchase; rights and limitations; survey. (a) When the regional administrator is satisfied that the successful bidder is qualified, that he has the intention and financial means to develop and use the land in accordance with the act and his proposed utilization program, the regional administrator will authorize the issuance by the manager of a certificate of purchase on Form 4-1139, containing the reservations as listed in the published notice of sale. * * *"

"Sec. 75.37 Termination of certificate; removal of improvements. (a) At the end of three years from the date of issuance, unless there is then pending an application for the issuance of a patent filed in accordance with Sec. 75.38, the certificate of purchase will be void and of no further effect, all rights thereunder will terminate; and no moneys paid thereon may be returned. No extension of time for compliance with the terms of the certificate of purchase can be granted. (b) Thereupon the manager will allow the approved holder of the certificate of purchase 90 days from notice within which to remove from the land any materials, improvements, structures, or other property placed thereon. After the 90-day period or any extension thereof granted by the manager because of adverse climatic conditions or other sufficient cause, all such materials, improvements, struc-

tures, and property not removed will become the property of the United States. * * *"

That placer mining locations may be made only upon public land that has not been legally reserved or appropriated to any other use and purpose is too well settled to admit of debate. Copper Belt Silver and Copper Mining Company, 51 LD 475, 479; El Paso Brick Company v. John H. McKnight, 233 U.S. 250. So the primary question to be resolved here is whether under the various laws, Executive Orders and rules and regulations referred to, including the general mining laws of the United States, the land involved in this litigation was open to location for placer mining at the time of its location by the defendants.

It is here found as a matter of law, that the land was reserved from mining location by the Executive Orders of April 21, 1914 and May 8, 1922, and that under the circumstances here presented, such reservation so made exists until actual patent is issued to the surface owner upon sale made under the Act. Therefore, when the defendants Morley and Edwards attempted to locate the land as placer ground on April 18, 1952, it was not open to such location under the laws of the United States.

It is asserted in the pleadings and confirmed by common knowledge, that the removal of the "minerals", i.e., the gravel from the land, (2 Lindley on Mines, 3rd Ed. Sec. 428, p. 1014) would entirely destroy its usefulness to the owner who purchased

it at the sale made under the Act. Such a mining operation would almost certainly leave in the tract designed for housing and for use as commercial purposes, a deep and unsightly and probably unsanitary pit surrounded by a settled community on the very margin of the City of Anchorage and in the midst of its populated area. While the Act provides for damages only, it seems clear that the equity powers of the Court may be rightly invoked to prevent unlawful and irreparable damage in the first instance.

The permanent injunction prayed for may be granted.

Findings of fact and conclusions of law in accordance herewith may be prepared and submitted.

Dated at Anchorage, Alaska, this 17th day of December, 1952.

/s/ Anthony J. Dimond,
District Judge.

United States
Department of the Interior
Office of the Secretary
Washington 25, D.C.

A-26443 October 14, 1952

Mrs. A. T. Van Dolah — Anchorage 015083, 018026
Contract under Materials Act held invalid; application to purchase material rejected.
Affirmed.

Appeal From the Bureau of Land Management

Mrs. A. T. Van Dolah has appealed to the head of the Department from a decision by the Assistant Director of the Bureau of Land Management dated January 5, 1952, affirming a decision dated May 21, 1951, by the Regional Administrator, Region VII, which declared that a one-year contract (Anchorage 015083) entered into with Mrs. Van Dolah on February 17, 1950, pursuant to the Materials Act (43 U.S.C., 1946 ed., Supp. V, secs. 1185-1188) for the sale of clay from an unsurveyed area near Anchorage, Alaska, was invalid, and which rejected her application (Anchorage 018026) under the Materials Act for a new contract to purchase clay from the land included in the contract Anchorage 015083.

On May 29, 1949, the land involved in this proceeding was withdrawn "from all forms of appropriation under the public land laws, including the mining and mineral-leasing laws", and was reserved under

the jurisdiction of the Secretary of the Interior pending the relocation of a portion of the Anchorage-Seward highway (Public Land Order No. 576, 43 CFR, 1951 Cum. Pocket Supp., pp. 177-180).[1]

On February 17, 1950, a contract Anchorage 015083 was executed pursuant to the Materials Act by the Acting Regional Administrator, Region VII, for the sale to the appellant during the ensuing year of 1,000 cubic yards of common clay from land reserved by Public Land Order No. 576. Various circumstances prevented the removal of clay pursuant to the contract during the year following the date of its execution.

In a letter filed on January 8, 1951, the appellant requested an extension of time within which to perform the contract. This request was rejected upon the ground that it had not been filed within the time prescribed by section 8 of the contract—i.e., "not less than 90 nor more than 150 days prior to the expiration of the contract."

Thereupon, the appellant filed an application for a new contract covering the purchase of clay from the same land. This application was rejected by the Regional Administrator, whose decision also declared that the contract Anchorage 015083 had been entered into without proper authority and, therefore, was invalid.

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[1]On December 7, 1944, the land had been withdrawn from all forms of appropriation under the public-land laws and reserved for the use of the War Department by Public Land Order No. 253 (43 CFR, 1946 Supp., pp. 6341-2). That order remained in effect until the issuance of Public Land Order No. 576.

After an affirmance of the Regional Administrator's decision by the Assistant Director of the Bureau of Land Management, the present appeal to the head of the Department was taken.

Public Land Order No. 576 prohibits all forms of appropriation under the public-land laws of the land involved in this proceeding. Ordinarily, soil and mineral deposits in land are regarded as part of the land until severed from the land.[2]

Neither the language of Public Land Order No. 576 nor the purpose for which the land was withdrawn from appropriation under the public-land laws suggests an intention to exclude disposals under the Materials Act from the scope of the order. Accordingly, it is concluded that the Materials Act is a public-land law within the meaning of Public Land Order No. 576, and that a contract under the Materials Act for the sale of clay would constitute an appropriation of land under the public-land laws within the meaning of that order.

Thus, it appears that the execution of the contract Anchorage 015083 was not authorized, and that there was no basis for granting the appellant's request for an extension of the time for the performance of the contract, even if the appellant had filed a timely request for such extension. In any event, no extension of the one-year contract Anchorage 015083 was actually granted.

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[2]II Tiffany, The Law of Real Property, Sec. 587 (Third Ed.).

The considerations mentioned above apply likewise to the appellant's application (Anchorage 018026) for a new contract to purchase clay on the same land. The application cannot be allowed as long as Public Land Order No. 576 prohibits any appropriation of this land under the public-land laws.

The record indicates that some consideration is being given to the modification of Public Land Order No. 576 with respect to the land involved in this proceeding for the purpose of opening the land to mining location. In fact, the appellant asserts that she has located mining claims on the land with respect to the clay deposits.[3]

The Department has held that deposits of common clay cannot be patented under the mining laws, although land containing clay of an exceptional nature may be subject to mining location and patent. *Holman et al. v. State of Utah,* 41 L.D. 314 (1912).

If (disregarding the existing withdrawal order) the land involved in this proceeding is subject to location and patenting under the mining laws because of the value and kind of the clay deposits on the land, such deposits are not subject to sale under the Materials Act (Solicitor's Opinion M-36044, July 7, 1950; Solicitor's opinion M-36056, November 10, 1950; 43 U.S.C., 1946 ed., Supp. V, sec. 1185).

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[3]Aside from any other consideration, any such claims which were located on or after May 29, 1949, are invalid, because Public Land Order No. 576 withdrew the land in question from mining location on and after that date.

On the other hand, common clay is one of the materials that is designated in the Materials Act as subject to disposition under the act. In considering the meaning of the term "common clay" as it is used in the Materials Act, it may be noted that, prior to the passage of the act, the Under Secretary of this Department stated that the proposed bill would apply to "clay to be used for the manufacture of bricks, tile, pottery, and similar products", in addition to, and as distinguished from, "common earth to be used for road fills, earth dams, stock-watering reservoirs, and similar uses".[4]

The Assistant Director's decision, in effect, rejected the appellant's application for a new contract under the Materials Act for the reason that the deposits applied for are subject to location under the mining laws. This conclusion appears to have been based upon the appellant's belief that the clay has unusual qualities.

The only evidence in the record concerning the kind of clay deposits in this land consists of assertions by the appellant that "by using a process developed by us", fire resistant products and ceramics can be manufactured from this clay, and the appellant's reply to a question in application 018026 that the material desired is pottery clay. Such evidence in itself does not provide an adequate basis for determining that the clay is subject to mining location and hence, is outside the scope of the Materials Act, particularly since

[4]Sen. Rep. No. 204, 80th Cong., 1st Sess. (1947), p. 3.

the same material is described as common clay in contract Anchorage 015083.

Accordingly, in the event that Public Land Order No. 576 is modified with respect to this land, and other applications for these deposits are filed under the Materials Act or mining locations are attempted, it appears that objective factual data or expert opinions will be necessary in order to arrive at a proper determination regarding the character of the clay deposits on this land.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F.R. 6794), the decisions below holding that contract Anchorage 015083 was invalid and that application Anchorage 018026 must be rejected are affirmed; but this affirmance is without prejudice to any efforts that the appellant may make hereafter to obtain the clay deposits on this land in the event of the subsequent modification of Public Land Order No. 576 in so far as it relates to this land.

(Sgd) Mastin G. White
Solicitor.

§47-2-78. Leases of school lands: Authority of Governor: Leases to conform to authority granted Territory. The Governor is hereby authorized to lease all lands surveyed and reserved for the support of the public schools in this Territory as provided in Section One of the Act of Congress, approved March 4, 1915, (Sec. 353, Title 48, USC; (§47-2-21 herein)) and all leases so made shall be in conformity with the authority granted the Territory in said Act. (L 1933, ch 101, §1, p. 184; CLA 1933, §1411.)

§47-2-79. Application for lease: Description of land and purpose. All persons desiring to lease any school lands shall make application therefor under oath, and in such application shall describe the land sought to be leased and the purpose and use to which the same is to be put. (L 1933, ch 101, §2, p 185; CLA 1933, §1412.)

§47-2-80. Fixing rental: Term: Disposition of proceeds. The Governor shall fix a reasonable rental for each such lease and shall likewise fix the term thereof, but no lease shall be for a longer period than ten years; the proceeds from all leases shall be paid to the Territorial Treasurer and by him be covered into the School Fund. (L 1933, ch 101, §3, p 185; CLA 1933, §1413.)

§47-2-81. Preparation of lease form: Contents. It shall be the duty of the Attorney General, when requested by the Governor, to prepare a form of lease which shall contain the usual covenants and condi-

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tions safeguarding the rights of the Territory and provide for the cancellation and forfeiture thereof in case of failure of the lessee to comply with any of such terms and conditions. (L 1933, ch 101, §4, p 185; CLA 1933, §1414.)